FILED FEBRUARY 11, 2009

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – LOS ANGELES

In the Matter of **JAMES EARL BROWN** **Member No. 59180** A Member of the State Bar.	)	**Case Nos.: 04-O-11346, 04-O-15240, 05-O- 04220, 06-O-10652, 06-O-13629, 06-O-14811, 06-O-10736, 06-O-14379, 06-O-14452, 06-O-15073 (CONSOLIDATED)** **DECISION INCLUDING DISBARMENT RECOMMENDATION AND INVOLUNTARY INACTIVE ENROLLMENT ORDER**

I. INTRODUCTION

The decision results from the trial of four separate Notices of Disciplinary Conduct that were filed against respondent over time. These actions arise out of four separate client matters and two different client trust accounts (CTA). The trial extended over a lengthy period of time as new charges were filed by the State Bar against respondent and the parties agreed to consolidate them into the then pending action and trial.

Respondent is charged here with numerous violations, including wilfully violating (1) rule 4-100(A) of the Rules of Professional Conduct[1] (misuse of client trust account); (2) Business and Professions Code section 6106 (moral turpitude-issuance of bad checks)[2]; (3) rule 3-700(A)(2) (improper withdrawal from representation); (4) section 6068(m) (failure to inform client of significant developments); (5) rule 4-100(B)(4) (failure to pay client funds promptly;

[1] Unless otherwise noted, all future references to rule(s) will be to the Rules of Professional Conduct.

[2] Unless otherwise noted, all future references to section(s) will be to the Business and Professions Code.

(6) section 6106 (moral turpitude- misappropriation); (7) rule 3-110(A) (failure to act with competence); (8) section 6068(m) (failure to respond to client inquiries); (9) rule 4-100(A) (failure to maintain client funds in CTA); (10) rule 4-100(B)(3) (failure to render accounting); (11) rule 4-200 (unconscionable fee); (12) rule 3-700(D)(2) (failure to refund unearned fees);; (13); section 6068(i) (failure to cooperate in State Bar investigation.

As set forth more fully below, the court concludes that respondent is culpable of multiple acts of misconduct and recommends that he be disbarred.

II. PERTINENT PROCEDURAL HISTORY

A Notice of Disciplinary Charges (NDC) in cases nos. 04-O-11346 and 04-O-15240 was filed on July 12, 2006. The NDC in cases nos. 05-O-04220, 06-O-10652, 06-O-13629, and 06-O-14811 was filed on April 30, 2007, and amended by the State Bar on July 31, 2008. Those cases were consolidated with the above cases on June 27, 2007. The NDC in case no. 06-O-10736 was filed on September 11, 2007. The NDC in case nos. 06-O-14379, 06-O-14452, and 06-O-15073 was filed on December 13, 2007.

Trial in the matters began in certain of the matters on January 15-16, 2008. In order to include later filed charges in it, the trial was recessed and then re-convened on June 23, 2008. It continued on June 24, 25, 26, 27 and 30. It was followed by a period of extensive post-trial briefing, including the filing of additional motions to dismiss and amend.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Jurisdiction

Respondent was admitted to the practice of law in California on June 18, 1974, and has been a member of the State Bar at all relevant times.

Basic Background Facts

Respondent is primarily a criminal defense attorney, although his practice over time has encompassed many different types of issues. By the mid-part of 2002, he had opened and was maintaining four separate offices, all owned by him as a sole proprietor. One of those offices was located on North McClay Avenue in San Fernando and focused primarily on criminal cases and worker's compensation cases. The second office was located on Figueroa Street in Los Angeles, and also focused on criminal matters and workers' compensation matters. Those two offices had been maintained by respondent since approximately 1976. The third office was located on Wilshire Boulevard in Los Angeles, and handled primarily plaintiff's personal injury cases. It was not operated by respondent until the end of 2001, at which time he acquired it from a disbarred attorney who continued to work in the office (see extended discussion below). And the fourth office was located in Rosemead and handled immigration cases exclusively. That office was opened by respondent in mid-2002. Respondent had an individual office at all four locations, but was not frequently at any of them. He described himself at trial as spending most of his time in the criminal courts.

Case Nos. 04-O-11346 and 04-O-15240
Case No. 06-O-10652 and 06-O-14811

Facts

In 2003 and until late 2005, respondent maintained a client trust account at the Wells Fargo Bank. Between November 2003 and February 2004 (Case Nos. 04-O-11346 and 04-O-15240) and continuing into November 2005 (Case No. 06-O-10652 and 06-O-14811), he repeatedly issued checks on that account for business and personal purposes. These checks included, but are not limited to, checks made payable to restaurants, to auto maintenance facilities, for child care, for book stores, for office supplies, for personnel salaries, for office rent, and to Costco. In addition, during this same period, he repeatedly issued checks for cash on the

account, totaling more than ten thousand dollars. These checks were frequently in amounts of $100.00 or multiples thereof, and were used for personal and business purposes.

In addition to the above, between December 2003 and January 2004 (Case Nos. 04-O-11346 and 04-O-15240), respondent issued the following checks on his CTA against insufficient funds: (1) check no 2838, payable to Costco Wholesale, issued on December 30, 2003, in the amount of $76.05; (2) check no 2826, payable to Cash, issued on January 5, 2004, in the amount of $320.00; and (3) check no 2835, payable to Cash, issued on January 5, 2004, in the amount of $60.00. Each of these checks was paid against insufficient funds. At the time the January 5, 2004 checks were written, the CTA had a negative balance ($-154.72]. Respondent knew or should have known that there were insufficient funds in the account to cover the checks issued on January 5, 2004.

Rule 4-100(A) (Misuse of Client Trust Account)

By repeatedly disbursing funds from the client trust account for personal and business purposes, respondent wilfully and repeatedly violated rule 4-100(A). (*In the Matter of Doran* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 871, 876; *In the Matter of Broderick* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 138, 157; *In the Matter of Sampson* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 119, 127.)

Section 6106 (Moral Turpitude - Issuance of Checks Without Sufficient Funds)

Section 6106 prohibits an attorney from engaging in conduct involving moral turpitude, dishonesty or corruption. "Writing checks when one knows or should know that there are not sufficient funds to cover them manifests a disregard of ethics and fundamental honesty, at least if such conduct occurs repeatedly. Writing bad checks may, by itself under some circumstances, constitute moral turpitude." (*In the Matter of Mapps* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 1, 11, citing *Segal v. State Bar* (1988) 44 Cal.3d 1077, 1088; *Bambic v. State Bar* (1985) 40

Cal.3d 314, 324; see also *Rhodes v. State Bar* (1989) 49 Cal.3d 50, 58; *In the Matter of Heiner (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 301,315.)*

Respondent's actions in repeatedly writing checks without adequate funds to cover those checks constituted an act of moral turpitude.

Case No. 05-O-04220-(Denis Will Matter)

Facts

In 2003, Denis Will was a security guard in the complex where respondent lived. He was a citizen of South Africa, facing a removal proceeding brought against him by the United States government. He was scheduled to go to a hearing on the removal effort on March 26, 2003. Respondent agreed to represent him in the matter *pro bono*.

On March 26, 2003, respondent filed a notice of entry of appearance as Will's attorney in the removal proceeding and appeared as his attorney at the scheduled hearing. He requested time to prepare a defense to the proceeding, which request was granted by the court. The hearing was then put over until July 11, 2003.

At the time of the July 11, 2003 hearing, respondent was required to be in court on a pending criminal matter. As a result, he sent Fred Alschuler, an associate attorney in his office, to Will's hearing to explain respondent's absence and to request a postponement of the hearing date. Mr. Alschuler specially appeared for respondent at the hearing, explained respondent's absence, and secured a new hearing date of November 15, 2004, more than a year later. In the interim, of course, Will was entitled to remain in the country, notwithstanding the continued pendency of the government's request that he be removed. Will was present at the July 2003 hearing and was aware of the new November 2004 hearing date.

Shortly after the July 2003 hearing, respondent filed a motion to dismiss the removal proceeding on Will's behalf. The evidence is conflicting as to whether the motion was heard and denied or never heard. In either event, it was not granted.

At some point prior to the November 2004 hearing date, respondent became aware that Will had submitted dishonest statements to the United States government in conjunction with his efforts to remain in the United States. Respondent concluded that he could no longer represent Will in the removal proceeding. He notified Will of that fact prior to the November hearing and did not appear at it.

At the November 2004 hearing Will appeared on his own behalf. He did not disclose to the court that he had been told by respondent that respondent would no longer represent him. Instead he allowed the court to conclude that respondent had abandoned him. Because of respondent's ostensibly unexplained absence from the proceeding, the Immigration Court continued the hearing once again, until January 2005.[3] In addition, the court found that Will had been "abandoned" by his attorney and advised Will to file a complaint with the California State Bar.

At some point after the November 2004 hearing, and before the January 2005 hearing, Will moved to Colorado. There is no indication of any contact between Will and respondent after the November hearing. Respondent testified credibly here, and Will previously represented to the United States government, that Will never notified respondent of where he was moving or had any contact with respondent after moving to Colorado.

Although the Immigration Court viewed respondent as having abandoned Will, it nonetheless subsequently directed its notice of the January 2005 hearing to respondent. Because

[3] The effect of Will's securing this new postponement of the removal hearing was that he would have yet more time to remain in the country before there was any resolution of the removal action.

respondent was generally aware that Will had moved but had no information as to where to forward the notice, he was not able to notify Will of the hearing notice. Will was, of course, at the prior November session and was aware of the new January 14, 2005 hearing date.

When Will's matter was called by the Immigration Court on January 14, 2005, Will was present. Respondent was not. At this hearing, Will notified the court that he had moved to Colorado, and the government then made an unopposed motion to have venue transferred to Denver. That motion was granted. Will was advised by the court at the time that he would receive notification at some future date from the Colorado court of the new hearing date.

Apparently because respondent had not filed a formal withdrawal of counsel from the proceeding, on January 19, 2005, he was served with notice by the Immigration Court in Denver that the new hearing would be held in Denver on March 2, 2005. Because respondent did not have any address for Will, he was unable to provide notice of this hearing date to Will. At the time this notice was served, Will had previously provided to the government his address in Colorado.

Although respondent was not able to contact Will regarding the hearing date, he did contact the Immigration Court in Denver. He informed the court of the situation, offered to attend the March hearing if necessary, and was told that such was not necessary.

When the March 2, 2005 hearing was called, neither Will nor respondent was present. The matter was then continued until July 27, 2005, once again resulting in additional time for Will to remain in the country while the removal proceeding remained unresolved.

By April 2005, Will had provided the government with both his residence address and a post office mailing address. (Exhibit 28, p. 57.) On June 10, 2005, the Immigration Court sent notice of the July hearing, both to respondent and to Will. (Exhibit 10.) Because respondent still had no address for Will, he was unable to contact him regarding the hearing date. Once again, he

contacted the Denver court about the situation, offered to appear at the hearing, and was again told that such was not necessary.

On July 27, 2005, respondent did not appear for the hearing in Denver. Neither did Will. The Immigration Court then issued an order *in absentia* that Will be removed from the country.

Service of notice of the removal order was then mishandled by the court. It was directed to respondent, rather than Will; and the order was characterized in the notice as directing that respondent be removed from the country. No effort was apparently made by the government or the court to serve Will with the order, despite the government's knowledge of Will's address. When respondent received the notice of removal, he remained unable to forward it to Will, since he still had no address for him.

In August 2005, the government notified Will directly of the removal order, serving him directly with a so-called "bag and baggage" order. A copy of this order was not sent to respondent. Will then appeared in the proceeding with counsel from Colorado and moved to vacate the prior decision. As part of seeking to have the removal order vacated, Will claimed abandonment and misconduct by his prior counsel. In conjunction with that contention, Will filed a complaint with the State Bar, a procedural requirement for the making of any such argument. (*Matter of Lozada,* 19 I&N Dec. 637 (BIA 1988).) Will did not disclose in his declaration in support of the motion to set the removal order aside that he had been informed even before the November 2004 hearing that respondent would no longer be representing him and that he needed to retain new counsel. (Exhibit 28, p. 32.)

The government subsequently agreed that the prior notice had been mishandled and stipulated that the removal order should be vacated and the case re-opened. (Exhibit 28, p. 10.) As of March 2007, four years after respondent had agreed to attend the already scheduled March

2003 removal hearing, the removal proceeding against Will was still unresolved and Will still remained in the country. (Exhibit 28, p. 1.)

Rule 3-700(A)(2) (Improper Withdrawal From Employment)

The NDC alleges: "*By not appearing at the court hearing on or about November 15, 2004, by terminating his representation of Will on the morning of the hearing after more than 16 months of no communications, and by not submitting any notice of withdrawal with the immigration court, respondent withdrew from employment without taking reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, in wilful violation of Rules of Professional Conduct, rule 3-700(A)(2).*"

The State Bar has failed to present clear and convincing evidence of any wilful violation by respondent of this rule. It is undisputed that respondent made Will aware prior to the November 2004 hearing that Will needed to retain new counsel. While respondent should have notified the court of his intent to withdraw from the case, such an action by him may well have resulted in more prejudice to Will, not less. Given Will's overriding purpose of seeking to avoid being removed from the country, there has been no proof of any prejudice caused Will by respondent's conduct, especially in view of a record suggesting that Will will ultimately be removed from the country when his matter is heard on the merits.

This court is dismissed with prejudice.

Section 6068(m) (Failure to Inform Client of Significant Development)

The NDC alleges: "*By continuing to fail to file a notice of withdrawal or to otherwise notify the immigration courts that he was no longer representing Will, despite having received notices from the court showing that he remains attorney of record; by not informing Will about the hearings set by the court so that Will or his new attorney may appear before the court; and, by not forwarding the court notices to Will so that Will can bring them to court as instructed,*

Respondent failed to keep a client reasonably informed of significant developments in a matter in which respondent had agreed to provide legal services."

The State Bar has failed to present clear and convincing evidence of any violation by respondent of his duties under section 6068(m) in this matter.

Respondent's failure to file a formal withdrawal of counsel is not a violation of respondent's duty to notify his client of significant developments. It is undisputed that respondent told Will that he was no longer going to be appearing for Will in the removal proceeding. The court is not respondent's client. Further, while respondent never filed a formal withdrawal as counsel, he nonetheless contacted the Denver court on two occasions and notified it that he no longer represented Will.

With respect to respondent's failure to notify Will of the hearings after November 2004, the evidence is undisputed that respondent did not have an address for Will and had no contact with him. He cannot be faulted for being unable to reach a former client who has made himself unreachable. Moreover, there is no evidence that Will was either unaware of the hearing dates or expected respondent to keep him informed of them. Will was provided by the court with notice of the July 2005 hearing, but nonetheless failed to appear.

No wilful violation of section 6068(m) having been proved, this count is also dismissed with prejudice.

Case No. 06-O-10652-(Ruth Martinez-Robles Matter)

Facts

This case arises out of the office acquired by respondent in 2001, on Wilshire Boulevard in Los Angeles.

Respondent did not create this office; he acquired it. In 2001 he was approached by Francisco Gutierrez, a person with whom respondent occasionally played basketball, with a

proposal that respondent take over the office. Gutierrez at the time had already been disbarred, and a subsequent attorney in the office, Dan Meza, had then also been disbarred. While the office had been taken over by another attorney, that attorney had recently decided to leave that practice and accept a position with the California Attorney General's Office. As a result, there was no licensed attorney still associated with the practice.

The practice of the office was primarily civil matters, particularly plaintiff's personal injury cases. The office had long had a well-publicized phone line that was popular in the local Hispanic community. It continued to generate significant business for the office. Respondent agreed to take over the office but contemplated that the office would be run primarily by Fred Alschuler, whom respondent regarded as more knowledgeable about civil matters. The office would be operated under the name of Brown and Associates, a business wholly owned by respondent. Respondent assumes responsibility for the office in late 2001, opening a client trust account at that time in the name of Brown and Associates. He was the sole designated signatory on that account.

As part of taking control of the business, respondent also agreed that several existing employees of the office would remain as employees of Brown and Associates. These included Gutierrez and another non-attorney, Alberto Cervantes. Gutierrez was given the title office manager. Cervantes was designated a law clerk. Because neither respondent nor Alschuler spoke fluent Spanish, these individuals were essential to the office being able to communicate with many of its eventual clients.

Neither respondent nor Alschuler exercised any real control over the office. Alschuler would spend his time in his office, looking at his computer. Respondent was generally somewhere else. Respondent had provided the office with a signature stamp, and it was used by Gutierrez and Cervantes with little or no supervision or actual restriction. Nor did respondent

exercise any real oversight on how the day-to-day operations of the office were being conducted. In fact, Gutierrez and Cervantes were actively engaged in the unauthorized practice of law, actively signing up clients in the name of Brown and Associates, filing and settling claims on those clients' behalf, and handling the financial arrangements generated by this business. Respondent paid these individuals a bonus for the work they generated.

Unfortunately, the business practices followed in the office fell far short of those mandated by the standards applicable to attorneys. There were kickbacks to chiropractors for referring work. People in the office dipped into both the office business account and the client trust account to take money and pay personal business expenses. Medical liens were ignored. And eventually the rights of clients to receive their funds were also ignored.

Any modest supervision or interest by respondent in the operations of the business would have revealed the unauthorized practices that were being conducted there. Respondent, however, elected to stay blind to the situation. Even when he could no longer claim to be unaware that illegal activities were being undertaken there, he did not fire the employees or close the office. Instead, he allowed them to continue to do business in his name.

In 2003, for example, the State Bar notified respondent, in a letter dated September 29, 2003, that it had received information that he was employing Gutierrez, a disbarred attorney; that respondent had not notified the State Bar of that fact; and that there were now allegations that Gutierrez was "currently negotiating and settling cases for your law office." The State Bar requested respondent to inform it whether he had hired Gutierrez and to describe what duties he performed. On September 30, 2003, respond replied in writing to the State Bar, "We stand advised that Francisco is a disbarred attorney. [¶] I did not hire Francisco. Francisco was asked for his help in investigating and settling the (closed) files of Attorney Daniel Meza, St. Bar No. 108475." The letter goes on to specifically deny that Gutierrez practiced law or was actively

settling or negotiating cases, other than as a conduit of communications from respondent or Alschuler. Respondent described Gutierrez as working principally as an interpreter and working at all times under the close supervision of either respondent or Alschuler. Such was clearly not the case. Respondent either knew this at the time or was grossly negligent and reckless in failing to know it.

On June 15, 2004, the State Bar again took steps to investigate what activities were taking place at respondent's office, meeting in person with Alschuler and Gutierrez at the Brown and Associates office.[4] It was told at the time by both individuals that Gutierrez was not participating in any unauthorized practice of the law, but served only as the office manager, "assisting all the attorneys in the office with the maintenance of former files that belonged to disbarred Attorney Daniel Meza."

Respondent now actively acknowledges and complains that Gutierrez and Cervantes during this time were actively practicing law. He also complains that they were actively helping themselves to the monies going through the office, including funds belonging to the clients.

Respondent's ability to ignore what was going on ended by at least August 2005, when he received a complaint that the proceeds of a $20,000 settlement had not been used to extinguish a debt owed to GMAC, as was required. When respondent asked in the office about what had happened to the money, he learned that Gutierrez had diverted the money for his own use. His actions involved actions that were both unauthorized and illegal. Despite this, respondent

[4] Three days after this visit by the State Bar, Rebecca Tapia, an attorney working on a contract basis for respondent, terminated her relationship with the office without any prior notice, clearing out her office over the week-end. In a memorandum sent by her to another co-worker in the office during the preceding month, she had memorialized her observation at the time that Gutierrez "is disbarred and has never disclosed this fact to the several clients, has not received their consent to work on their case, he is not supervised, and he still quotes fees and works on cases without any supervising…."

continued to employ Gutierrez. He also paid with his own funds the money diverted from GMAC.

Respondent states that at this time he began to personally investigate what was being done at the office. He learned that Gutierrez and Cervantes were running their own practice in his name and diverting funds from his accounts. Nonetheless, he continued to employ them and operate the office.

In the answer to the NDC filed by respondent in this matter, he provides an extensive narrative history regarding what happened. It includes the following: "During the period from November 2001 until August 2005, there were shortfalls in payments to Fred, I would take affirmative action to withdraw funds from the corporate CTA into my private CTA, take out cash to money orders payable to his wife as court ordered obligations. [¶] Since all financial matters were directed to Fred since I was usually in criminal courts, we were unaware that Francisco and the remainder of the Gutierrez/Caballero Group were engaged in the practice of law under respondents name and identity information. [¶] Respondent became aware in August of 2005, that Francisco and the Gutierrez/Caballero Group had singled him out for a "set-up" to steal property from Mexican-American Clientele by aiding Francisco to practice law under respondents identity information. These individuals filed law suits, took retainer fees from "Latino" clients from various locations knowing such activities would cause respondents disbarment….[¶] Respondent took no action but to call the police on September 21, 2006 [sic], raid the office for additional information concerning the (hidden) files reflecting the income and all corporate checks and business checks of which were hidden. Respondent subsequently discovered that the activities of the Gutierrez/Caballero Group involved a sum of approximately $950,000.00 of funds from Mexican-American Clients from the old (Gutierrez & Gutierrez) clientele and the Meza &

Associates clientele were deposited through respondent's CTA." (Respondent's Amended Answer to Disciplinary Charges, Case Nos. 04-O-11346 and 04-O-15240, pp. 9-10.)

On October 6, 2005, respondent sent a letter to the Los Angeles Police Department, as a follow-up report to a report respondent filed in late September. In the letter, respondent noted that Gutierrez was making on line transfers from the office's bank account, using respondent's signature stamp to forge checks on both the office business and client accounts, and diverting funds to himself and his family.[5] Nonetheless, the letter concludes, "I still employ Francisco so that I may be made available to the information of our business losses. I wish that any action be stayed until I can decipher the overall activity of this individual."

On October 21, 2005, respondent wrote another letter to the police department. In this letter he reported that he was conducting an audit of the "firm's book from January 2002 until September 23, 2005, under the control of my office manager, Francisco Gutierrez. My attention was drawn to his conduct by phone calls to my office Wilshire Blvd. Office [sic] by clients who had not been paid their settlement checks." The letter concluded with respondent's statement that he would forward the audit results when it was completed. Despite this awareness by respondent of misconduct by his staff, respondent continued to operate the office and employ the various suspect employees until June of the following year.

In January 5, 2006, respondent wrote to the State Bar that Gutierrez was forging checks and embezzling funds from his clients. He indicated that he had traced the funds to an account maintained by Gutierrez's wife, had provided information to the police, and had filed an action in federal court "to lockdown that account by way of ex parte application." The letter goes on to state, however, that respondent was continuing to allow Gutierrez to work in the office and that he

[5] At trial the parties stipulated, "From the date James E. Brown opened his client trust account, Francisco Gutierrez and others known to respondent and some unknown to respondent used trust account property directly and indirectly through electronic means for their own purposes and benefit."

had not served him with the federal action. "If your office determines that Mr. Gutierrez should be removed before the police make their determination, I cannot be assured that he will not abscond with this office's funds. I have therefore, not served him with this action, but I have curtailed his activities."

Respondent now blames the State Bar and the Los Angeles Police Department for the fact that these individuals performed the many inappropriate acts under his name.

It was in this context that the complaint of Ruth Martinez-Robles (Martinez) arises.

Martinez hired respondent's office in March 2004 to represent her in a personal injury action arising out of an automobile accident. She contacted the office and was met at her home by Cervantes, who discussed the matter with her and then had her sign a fee agreement with the law offices of Brown and Associates. He told her at the outset that he was an attorney. Later she realized he was a law clerk instead.

On May 26, a medical lien was signed by or on behalf of respondent in favor of Bay Rehabilitation Physical Therapy. On August 10, 2005, a medical lien was signed by or on behalf of respondent for a $422 medical bill incurred at Glendale Adventist Med Center.

On May 26, 2005, a settlement demand in the amount of $25,000 was made by respondent's office on behalf of Martinez. The letter demand was signed by Cervantes as "Law Clerk to James E. Brown."

Sometime near the beginning of October 2005, a settlement was reached between respondent's office, on behalf of Martinez, and the carrier for the defendant. This is, of course, after respondent has become aware of the inappropriate activities at the office. Martinez was unaware of the settlement at the time and was not informed of the amount of the settlement. The settlement was in the amount of $9,250. A check was issued by the insurer on October 7, 2005 for that amount and delivered to respondent's office on or about October 17, 2005. The check

was made payable to "Ruth Martinez and Brown & Associates." The check was then deposited into respondent's CTA. Martinez was not told that these funds had been received. Nonetheless, several days later, on October 18, 2005, respondent's firm paid to itself the sum of $3,083 as attorneys' fees on the case.

Martinez during this time was dealing with both Cervantes and Guiterrez. She was unhappy that she was being required to perform all of the footwork to gather the medical records and she was anxious to get the case settled. Despite her requests to speak to respondent, she was never able to talk with him.

It was not until December 2005, that Martinez learned that there had been any settlement of the case. At that time she received a letter signed by Cervantes, sending her a check also in the amount of $3,083. There was no explanation of how this amount had been calculated; nor was there any disclosure of the amount of the settlement. The check was signed by respondent. It purported to be dated October 18, 2005.

Martinez was growing increasingly unhappy during this period. She wanted an accounting of the proceeds and was not getting one. She felt that there should be a reduction in the fees received by respondent's firm, from the 33 1/3% figure in the fee agreement to a lesser amount. Eventually she complained to the State Bar, which then contacted respondent.

Respondent was made aware during this time of Martinez' demand that the firm reduce its fee. However, he recalled at trial instructing his staff to insist on adherence to the fee factor contained in the fee agreement that Martinez had previously signed with his office. As he stated to the State Bar in a letter dated May 22, 2006, "She retained us at %33 [sic] of recovery as legal fees." This testimony and letter conflict significantly with his testimony at another time during the trial that Martinez was not even a client of the firm. Eventually, after the State Bar became involved, Gutierrez agreed to reduce the firm's fee to 25% and to distribute what additional funds

were owed to Martinez. A second check was forwarded to the State Bar with respondent's letter of May 22, 2006 with a check in the amount of $2,423.11.

Attached to respondent's letter and check was an accounting of how the amount of the additional payment had been calculated. This accounting indicated that the client's recovery had been reduced by the amounts of money owed to cover the two outstanding medical liens, neither of which had been paid. The letter referred to the $422 Glendale Adventist bill. It also referred to a $1,450 bill from Bay Rehabilitation, with a note that it was willing to accept $1,000.

Although respondent's letter referred to the medical lien owed to Bay Rehab and withheld money to pay it, respondent could not say at trial that the bill was ever paid. In fact, at the time of trial, the bill remained unpaid. Martinez was continuing to receive demand letters that the bill be paid.

That the outstanding medical bills were not paid does not mean that the money from the settlement remained at all times in the CTA. To the contrary, the balance of the CTA fell well below what it should have been on numerous occasions, both before and after the "partial" payment. On December 20, 2005, the balance of the account was actually a negative number. The account balance was also deficient at many times after the second payment. From June 2006 through September 2006, the account balance was approximately $264, well less than the $1,422 withheld to pay the two medical liens.

Rule 4-100(B)(4) (Failure to Pay Client Funds Promptly)

Rule 4-100(B)(4) requires that an attorney "promptly pay or deliver, as requested by the client, any funds, securities, or other properties in the possession of the member which the client is entitled to receive."

There must be a request by the client for payment before there can be a violation of rule 4-100(B)(4). (*In the Matter of Kroff* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 838, 850; *In the*

Matter of Steele (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 708, 720; *In the Matter of Nelson* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 178, 188.) Martinez indicated that she made numerous and ongoing requests to receive the proceeds of her lawsuit, both before and after she received the partial payment in December 2005. This partial payment came approximately two months after the firm had paid fees to itself. It came in the form of a check that had been backdated to a date approximately two months earlier.

The balance of the money owed to Martinez was not paid to her until the end of May 2006, and then only after the State Bar had intervened. Although respondent's firm is not to be faulted for the delay in resolving the dispute over whether to reduce its fee, it has offered no explanation for why it did not pay at an earlier date the amount that would have been owed (over the amount of the outstanding unreduced medical liens), even if the firm's fee had not been reduced.

Finally, no explanation has been offered as to why the medical liens were not promptly satisfied. Having executed the two medical liens, the holders of those liens were owed the same duty of prompt payment of their entitlement to the settlement proceeds as Martinez. (*Guzzetta v. State Bar* (1987) 43 Cal.3d 962, 979.)

Respondent was directly involved in the dispute over this bill, the calculation of the amounts to pay and to withhold, and the eventual payments that were made. His failure to see that moneys were paid promptly to and on behalf of the client constitutes a wilful violation of his duties under rule 4-100(B)(4).

Section 6106 (Moral Turpitude-Misappropriation)

The evidence is undisputed that the balance in respondent's CTA fell below the amounts required to be maintained in that account to reflect the proceeds of the settlement funds received

in the Martinez settlement. Such a dip in the balance of the account supports the conclusion that there has been a misappropriation.

Given that respondent was aware throughout this time that employees of his office were misappropriating funds from his accounts, his failure to take steps to adequately protect the funds from misappropriation constituted at least gross negligence, and would more appropriately be characterized as a reckless disregard by him of his responsibilities.

Respondent's conduct constitutes acts of moral turpitude, in wilful violation of section 6106.

Case No. 06-O-13629-(Ana D'Aunoy Matter)

Facts

On March 18, 2005, Ana D'Aunoy (D'Aunoy), together with her husband, retained respondent (working out of his San Fernando office) to represent D'Aunoy with regards to her right to pension funds held by her former husband and his employer. They initially paid him $1,000 to pay the cost of investigating what her rights might be. Respondent determined that the employer had relocated to another state and then took steps to subpoena the records reflecting the pension rights against for which D'Aunoy might have a claim. Respondent succeeded in obtaining documents in August 2005.

The documents indicated that the total amount of the pension rights available totaled appropriately $7,200. D'Aunoy's potential community property claim would be one-half of this amount. On February 16, 2006, respondent told the D'Aunoys in writing that his services were complete and that they should retain another firm if they wanted to go forward with the matter.

D'Aunoy did not testify during the trial of this matter. Her husband did. He was clearly very angry at respondent's former employee, Morales, and was not a careful or reliable historian. His testimony was also interrupted by the end of the day's session and he did not return for the

completion of cross-examination by respondent. When asked to acknowledge that respondent had advised his wife that she would be economically better off pursuing her claim in small claims court, his denial was not convincing.

In March 2006, after respondent had previously indicated that his services were completed, D'Aunoy entered into a contract with respondent's office, whereby respondent would bring suit against the former husband and his former employer. The fee agreement provided that the firm would handle the matter on a contingency basis, but that if there were any recovery the firm would be entitled to retain all of a $5,000 retainer deposit that was required to be paid in advance.

After the D'Aunoy entered into this agreement to hire respondent to handle the case, her husband eventually convinced her that there was not enough money involved in the potential recovery to warrant investing the $5,000. The husband then called Morales to seek a refund of the deposit. During this time respondent's office provided a written status report, indicating that an investigation of how best to proceed was still underway. Morales, according to the husband, sought to encourage the D'Aunoys to go forward with the suit.

Under the terms of the fee agreement, Mrs. D'Aunoy had a right to terminate the agreement if she provided written notification of that fact to respondent. She eventually did that on July 12, 2006. On August 8, 2006, Morales wrote the D'Aunoys a letter, indicating that he had been trying to reach them to arrange for a refund but that their telephone number was disconnected. He asked that they come into the office on August 14, 2006, so that a refund could be made. The refund was made and acknowledged on August 15, 2006. Although respondent had a right under the agreement to be paid at a rate of $250 for his time in the matter, he refunded the entire amount of the deposit.

Rule 3-110(A) (Failure to Perform with Competence)

Rule 3-110(A) provides that an attorney must "not intentionally, recklessly, or repeatedly fail to perform legal services with competence."

The NDC alleges that respondent failed to perform legal services with competence because he did not file a lawsuit between March 1, 2006 and July 12, 2006. The evidence presented by the State Bar on this issue was incomplete and less than clear and convincing.

The status report at the time indicates that respondent was still investigating how best to proceed in May. The employer was located out of state. It is unclear precisely when the husband began indicating that the client had concerns about going forward with the lawsuit, but it is clear that these concerns were expressed some time prior to the relationship being terminated. Given the nature of the proposed lawsuit, respondent cannot be faulted for not rushing to commence the suit at a time when the client was expressing some hesitation about going forward. Ultimately, his "failure" to go forward proved to be precisely what the client wanted. On terminating their contract with respondent, the D'Aunoys made no effort to retain any other attorney to go forward with the possible case.

The court does not find any wilful violation by respondent of his obligation to perform legal services with competence in this particular case. This count is dismissed with prejudice.

Section 6068(m) (Failure to Respond to Client Inquiries)

The husband testified that he frequently had difficulty reaching Morales. At the same time, he indicated that he was successful in talking with him on numerous occasions. Only in passing does he indicate that he made any request to talk again with respondent personally.

The comments by the client's husband are neither clear nor convincing that respondent wilfully violated his duty to respond to requests by D'Aunoy for "reasonable status inquiries". The husband was not the client and he was not calling to seek a status report. He was calling to seek an agreement that all of the $5,000 deposit would be returned, notwithstanding the language

of the agreement. His demeanor during trial makes clear that he was quite heated and insistent in his approach. There is no testimony that each of his calls or requests was authorized by the client. But even if they were, there is ample reason to believe that those calls frequently fell outside the scope of "reasonable" inquiries governed by section 6068(m).

For each of the above reasons, the court does not conclude that respondent wilfully violated his duty in this particular matter under section 6068(m). Accordingly, this count is dismissed with prejudice.

Case No. 06-O-14811-(Rosa Sanfilippo Matter)

Facts

In June 2005, Rosa Sanfilippino ("Sanfilippino") hired Brown and Associates, through Cervantes, to represent her in a slip-and-fall case against Albertson's. She entered into this agreement when Cervantes went to see her while she was at her doctor's office. Cervantes gave her one of respondent's cards at the time she agreed to be represented by respondent. She entered into the agreement without ever going to the attorney's office.

In October 2005, Sanfilippino executed a medical lien in favor of Dr. Mario Arroyo, a chiropractor. The lien was also ostensibly executed by respondent, although this appears to have been done by use of a signature stamp. At the time this document was executed, respondent was aware that employees in his Wilshire office were making unauthorized use of his signature stamp, among other things.

In March 2006, Sanfilippino was notified by Cervantes that her case had settled. She signed settlement documents, returned them to respondent's office, and then waited to receive her money. She has been told that she can expect a payment of approximately $2,000. Albertson's funded the settlement on March 30, 2006, in the form of a check made payable to

Sanfilippino and Brown and Associates. That check was deposited in respondent's CTA.[6] Nonetheless, Sanfilippino never received any portion of it. Instead, she received a call from Cervantes, telling her that someone had stolen her check.

Sanfilippino made numerous calls to the office, asking that respondent call her about the situation. He never did. Eventually, as she continued to call his office, she was informed that his telephone number had been disconnected. Respondent did not provide her with another telephone number.

Although respondent should have maintained a balance of at least $2,000 in his CTA after this settlement, the balance in his account after May 4, 2006, remained at approximately $264 until September 2006. Sanfilippino, at the time of testifying at trial, had still not received any money from the proceeds of her settlement. Nor had Dr. Arroyo.

Rule 4-100(A) (Failure to Maintain Client Funds in Client Trust Account)
Section 6106 (Moral Turpitude-Misappropriation)

Respondent failed to deposit and maintain in his trust account the money due to Sanfilippino as a result of her settlement. Although there is no evidence that he personally misappropriated the funds for his own purposes, he was responsible for the account, had been aware for months that his employees were looting his funds and those of his clients, and yet he failed to take adequate steps to prevent such harm from recurring. That failure by him constituted at least gross negligence, and would more appropriately be characterized as a reckless disregard by him of his responsibilities.

His failure to maintain the client funds of Sanfilippino in his CTA constituted a wilful violation by him of his duties under rule 4-100(A) and acts of moral turpitude in wilful violation of section 6106.[7]

[6] The signature on the back of the check, ostensibly by Sanfilippino, was signed by someone other than the client. The signature by respondent appears to have been affixed by use of a signature stamp.

Rule 4-100(B)(3) (Failure to Render Accounts of Client Funds)

The obligation to "render appropriate accounts to the client" found in rule 4-100(B)(3) does not require as a predicate that the client demand such an accounting. (*In the Matter of Brockway* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 944, 952.) Instead, the obligation arises from the attorney's duty to keep the client's funds safe, a duty that is both a personal obligation of the attorney and one that is non-delegable. (*In the Matter of Robins* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 708, 713, citing *Palomo v. State Bar* (1984) 36 Cal.3d 785, 795, and *Coppock v. State Bar* (1988) 44 Cal.3d 665, 680.) This does not mean that an attorney is culpable of a moral turpitude violation by not personally managing his or her trust account, provided that attorney reasonably relies on a partner, associate, or other responsible employee to care for that account. However, even that reasonable reliance on another to care for the trust account does not relieve the attorney from the professional responsibility to properly maintain funds in that account. That is, in the handling of client funds, an attorney has a direct professional responsibility to his or her client, and the attorney does not avoid that direct professional responsibility by, even reasonable, reliance on a partner, associate or responsible employee. (*In the Matter of Blum* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 403, 411.)

As previously discussed, respondent's failure to take steps himself to protect the funds in his client trust account and his reliance in 2006 on others to do so was manifestly unreasonable and reckless. His failure in that regard caused him to fail to be unable to account to Sanfilippino regarding her money.

Such conduct by respondent constituted a wilful violation by him of his duties under rule 4-100(B)(3). However, because this violation is also so heavily interconnected with the

[7] Because the violation of rule 4-100(A) here is essentially a lesser included offense within the section 6106 violation, it will not be given any weight in assessing the appropriate discipline to assess in this situation.

misappropriation violation, it will not be given the additional weight of a non-duplicative violation.

Section 6068(m) (Failure to Respond to Client Inquiries)

Section 6068(m) of the Business and Professions Code obligates an attorney to "respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services." Sanfilippino testified credibly that she repeatedly attempted to inquire of respondent regarding the status of her funds, but that he failed to respond to her inquiries. Such conduct by him constituted a wilful violation of his duties under section 6068(m).

Case No. 06-O-10652

Facts

On October 5, 2005, respondent personally wrote a check (no. 3601) on his CTA, made payable to Cervantes in the amount of $2,000. He placed on the memo line of that check the notation that the check represented "salary." When respondent wrote this check he understood that the check was not actually for salary for Cervantes as the notation would indicate, but instead that Cervantes was going to cash the check and use the proceeds to make a kick-back payment to Dr. Arroyo. This manner of making payments to Dr. Arroyo was understood and intended by respondent to enable Dr. Arroyo to escape being required to report the kick-back income on his tax returns.

Section 6106 (Moral Turpitude)

Respondent's admitted participation in the above kickback and tax evasion scheme constituted an act of moral turpitude, in wilful violation of respondent's under section 6106.

Case No. 06-O-10736 (Dr. Biatriz Zamudio Matter)

Facts

This case arises out of an action by Dr. Biatriz Zamudio for wrongful termination from her position with the County of Los Angeles. Dr. Zamudio had been represented in that action by a series of attorneys, with each of whom she had become unhappy. After losing the action at the trial court level, she then went to Brown and Associates to seek a "second opinion" on what had happened to her case.

Dr. Zamudio was referred not to respondent as her prospective new attorney, but instead to Rebecca Tapia, a contract attorney then working in respondent's Wilshire office. Tapia had business cards identifying her as an attorney for Brown and Associates, and she would handle work in that capacity. She was also authorized to handle her own cases out of the Wilshire office.

When Zamudio met with Tapia, the initial problem was to organize the file obtained from the prior attorney, who remained Zamudio's counsel of record. Zamudio hired Tapia, through Brown and Associates, to perform that task.

Eventually an agreement was reached with Tapia, who was being supervised by Alschuler on this matter, whereby the firm would assist Zamudio in preparing a notice of appeal for Zamudio, who would then proceed to file it as in pro per counsel. A fee agreement was prepared and signed by Zamudio for this work. The agreement was subsequently executed by the firm by using respondent's signature stamp. The notice of appeal was prepared but then filed a day late. An extensive and ongoing debate arose between Zamudio, Tapia, and Alschuler as to who was ultimately at fault for this failure.

Because the notice of appeal was filed late, the defendants filed a motion to dismiss the appeal. A new fee agreement was prepared, calling for Zamudio to make a deposit of advance

fees in the amount of $5,000. This agreement was signed on behalf of the firm by Tapia, not by respondent. Zamudio made this deposit, but then subsequently requested the money back.

Zamudio's testimony regarding her dealings with the firm is disjointed and confusing. What is consistent throughout the firm's representation of her, however, is her lack of any belief that respondent was personally involved in her case. She never met with him during the representation and there were no specific assurances that he would be involved in her action. She had gone to the firm because of Tapia's stated experience in the area, rather than any interest in retaining respondent.

After the firm had substituted into the action, Zamudio made a decision to terminate its services and to ask for her deposit back. At that point a bill was prepared and submitted to Zamudio for close to $30,000. The bill was clearly excessive. Zamudio refused to pay it. She then protested to respondent the bill and the firm's failure to return her deposit. In a letter dated July 8, 2004, respondent agreed with Dr. Zamudio that her file had been mishandled and that she should have her advance deposit returned. This letter was written shortly after Tapia had precipitously left her employment at Brown and Associates following the appearance of State Bar representatives. Although respondent, in his letter to Zamudio, agreed that she should have her funds returned, he stated that Tapia had taken the funds with her. He then indicated that he was going to file a small claims action against Tapia to recover those funds. He eventually filed the action and subpoenaed Zamudio to appear at it. The funds were never recovered and no refund to Zamudio was ever made by respondent.

Rule 3-110(A) (Failure to Perform with Competence)

This count relates to the failure of the firm to timely file the notice of appeal and to otherwise properly handle Zamudio's effort to have the adverse trial outcome reversed. The State Bar has failed to present clear and convincing evidence of any wilful failure by respondent

to perform legal services with competence in that regard. There is no evidence that respondent was ever involved in the Zamudio matter or was ever requested to become involved in it. The work of Tapia was being actively supervised by an experienced civil practitioner, Alschuler. A failure by Tapia and Alschuler to perform all of their legal duties adequately on this matter does not represent any failure by respondent to honor his professional obligation to perform with competence.

This count is dismissed with prejudice.

Section 6068(m) (Failure to Inform Client of Significant Development)

In this count it is alleged that Zamudio was not kept informed of the various filings that occurred in the case while Brown and Associates was involved in it. Again, the evidence fails to prove any violation by respondent of his professional duties in that regard. He was not involved in the case. There is no evidence that he was ever aware of the developments about which the NDC alleges that Zamudio should have been informed. There was no expectation or request that he would be involved in the matter or would keep her informed of its developments. She was looking to others in the firm for that function. Finally, the evidence is less than clear and convincing that Zamudio was not kept informed of developments.

This count is also dismissed with prejudice.[8]

Rule 4-200(A) (Unconscionable Fee)

This count of the NDC alleges that respondent violated rule 4-200(A) by causing the unreasonable billing statement to be sent to Zamudio. There is no clear and convincing proof to support this allegation. There was no evidence that respondent was aware of or approved the billing statement sent to Zamudio. When he became aware of it, he immediately and emphatically repudiated it. No effort was ever made by him to collect it.

[8] Count Three of the NDC (Appearing for Party Without Authority) was dismissed by the State Bar during the trial.

This count is dismissed with prejudice.

Rule 3-700(D)(2) (Failure to Refund Unearned Fees)

Although respondent was not directly involved in the handling of Zamudio's underlying file, he did receive her request to be refunded the fees that she had advanced that were unearned. Respondent acknowledged that Zamudio was entitled to a refund but failed up to and through the trial of this matter to make it. At least a substantial portion of those fees were paid to Brown and Associates.

Respondent's failure to return to Zamudio the unearned fees constituted a wilful violation by him of his obligations under rule 3-700(D)(2).

Case Nos. 06-O-14379, 06-O-14452, and 06-O-15073 (Mishandling of Washington Mutual Bank CTA)

Facts

On May 10, 2006, respondent opened a CTA at Washington Mutual Bank. Shortly thereafter, in June 2006, he closed the four offices that he had previously maintained.

On September 1, 2006, the balance in the Washington Mutual CTA was $1,222.45. Between September 1 and September 15, checks totaling approximately $500 cleared the account, further reducing the balance of the account. On September 13, 2006, respondent deposited checks totaling $13,700 in the CTA, representing settlement checks on two matters. The bank had a hold policy on such checks of at least 11 days. Respondent knew or should have known of that hold policy. On two days after depositing the settlement checks, respondent wrote three checks: (1) to the settling client (Chavez) for $3,266.66; (2) to "Jon" for $2200.66; and (3) to a medical provider for $1,000. When presented to the bank for payment, all three of these checks bounced, resulting in the bank reporting the overdrafts to the State Bar.

Rule 4-100(A) (Misuse of Client Trust Account

The check to Jon was presented to the bank for payment on September 20, 2006; the check to the medical provider was presented to the bank on September 21, 2006. There was no restriction on the recipient of the checks being able to present them before the holding period had expired and both checks were presented during that time.

The NDC alleges that respondent's issuing of the two checks on his CTA, at a time when there were insufficient funds available in the account to cover the checks, was "grossly negligent in maintaining his client trust account."[9] It alleges such conduct represents a wilful violation of an attorney's obligations under rule 4-100(A).

At the time that the checks were written, there was less than $1,000 of available funds in the account to cover the checks. Nonetheless, the checks were issued without any restriction against immediate deposit on the face of the instruments, and they were delivered to the payees. These payees then presented the checks for payment before the funds previously deposited in the account became available to fund the checks.

The evidence was sufficient to support a charge and conclusion that respondent wilfully violated his duties under section 6106 (had it been charged) in issuing these checks where he knew or should have known that there were insufficient funds available in the account to cover the checks. Such conduct also constitutes a wilful violation by respondent of his duties under rule 4-100(A). (See *In the Matter of Respondent* F (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 17, 24-25, citing *Sternlieb v. State Bar* (1990) 52 Cal.3d 317, 321.)

Section 6068(i) (Failure to Cooperate in State Bar Investigation)

When the three checks bounced, the bank notified the State Bar, which then opened investigations and sent inquiries to respondent. With regard to the check to Chavez, a letter was

[9] The State Bar does not base this count on the check issued to Chavez. Although that check bounced, it was presented for payment on September 26, 2006, on the eleventh day of the anticipated 11-day hold.

sent by a State Bar investigator to respondent on January 10, 2007, asking for a response by January 27, 2007. A follow-up letter was sent on January 31, 2007, asking for a response by February 14, 2007. With regard to the check to Jon, a letter was sent by a State Bar investigator to respondent on October 18, 2006, asking for a response by November 1, 2006. A follow-up letter was sent on January 9, 2007, asking for a response by January 23, 2007. With regard to the check to the medical provider, a letter was sent by a State Bar investigator to respondent on October 18, 2006, asking for a response by October 31, 2006. A follow-up letter was sent on January 9, 2007, asking for a response by January 23, 2007.

Respondent received these letters and failed to provide any response to them.

Respondent's failure to respond to these inquires constituted a failure by him to cooperate with investigations of the State Bar, in wilful violation by him of section 6068(i) of the Business and Professions Code. (*In the Matter of Varakin* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 179,189; *In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 643-644.)

Motion to Dismiss

During the post-trial briefing process, respondent filed a motion to dismiss all counts lodged against him in this matter. The motion is disjointed, confusing, and frequently factually prejudicial to respondent's cause. It is generally based on claims of estoppel and accusations that others, especially the State Bar, are responsible for the misconduct that respondent allowed to occur in his law firm.

The motion lacks both factual and legal merit. It is denied.

Aggravating Circumstances

The State Bar bears the burden of proving aggravating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(b).)[10] The court finds the following aggravating factors.

Multiple Acts of Misconduct

Respondent has been found culpable of multiple acts of misconduct in the present proceeding. The existence of such multiple acts of misconduct is an aggravating circumstance. (Std. 1.2(b)(ii).)

Significant Harm

As described above, respondent's misconduct significantly harmed his clients and others. (Std. 1.2(b)(iv).)

Lack of Remorse

Throughout this proceeding respondent has failed to express any remorse or recognition for his responsibility for the misconduct that he committed or for the misconduct that he allowed other to perpetrate. Instead, he has sought to shift the blame for such actions to others. This lack of recognition by respondent of his responsibility for what has happened is a significant factor in aggravation.

"The law does not require false penitence. [Citation.] But it does require that the respondent accept responsibility for his acts and come to grips with his culpability. [Citation.]" (*In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502, 511.) Respondent falls substantially short in this regard.

Dishonesty

[10] All further references to standard(s) are to this source.

Respondent's misconduct at times was surrounded by bad faith, dishonesty, concealment, overreaching or other violations of the State Bar Act or Rules of Professional Conduct. (Std. 1.2(b)(iii). His improper use of his CTA at times was clearly intentional. His participation in the kickback/tax evasion scheme was knowing and highly improper.

Uncharged Violations/Aiding the Unauthorized Practice of the Law

Respondent offered into evidence hundreds of documents for the purpose of showing the inappropriate conduct of his employees. While his intent in offering such materials into evidence was somehow to shift responsibility away from himself, those documents showed quite clearly his participation in allowing both Gutierrez and Cervantes to participate in the unauthorized practice of law. Although this evidence may not be considered as an independent basis to impose discipline, it may be considered as a factor in aggravation.

Mitigating Circumstances

Respondent bears the burden of proving mitigating circumstances by clear and convincing evidence. (Standard 1.2(e).) The court finds the following mitigation factor.

No Prior Discipline

Respondent has practiced law in California only since 1974. He has no prior history of discipline. He is entitled to substantial mitigation under standard 1.2(e)(i).

IV. DISCUSSION

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, preserve public confidence in the profession, and maintain the highest possible professional standards for attorneys. (Std. 1.3; *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.) In determining the appropriate level of discipline, the court looks first to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d 1085, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) Although the standards are

not binding, they are to be afforded great weight because "they promote the consistent and uniform application of disciplinary measures." (*In re Silverton* (2005) 36 Cal.4th 81, 91-92.) Nevertheless, the court is "not bound to follow the standards in talismanic fashion. As the final and independent arbiter of attorney discipline, we are permitted to temper the letter of the law with considerations peculiar to the offense and the offender." (*In the Matter of Van Sickle* (2006) 4 Cal. State Bar Ct. Rptr. 980, 994, quoting *Howard v. State Bar* (1990) 51 Cal.3d 215, 221-222.) In addition, the courts consider relevant decisional law for guidance. (See *In the Matter of Van Sickle, supra*; *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 703.) Ultimately, in determining the appropriate level of discipline, each case must be decided on its own facts after a balanced consideration of all relevant factors. (*Connor v. State Bar* (1990) 50 Cal.3d 1047, 1059; *In the Matter of Oheb* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 920, 940.)

There are several standards applicable to the acts of misconduct here. The most significant of these standards are the following:

- Standard 2.2(a), which provides: "Culpability of a member of wilful misappropriation of entrusted funds or property shall result in disbarment. Only if the amount of funds or property misappropriated is insignificantly small or if the most compelling mitigating circumstances clearly predominate, shall disbarment not be imposed. In those latter cases, the discipline shall not be less than a one-year actual suspension, irrespective of mitigating circumstances."
- Standard 2.3, which provides: "Culpability of a member of an act of moral turpitude, fraud, or intentional dishonesty toward a court, client or another person or of concealment of a material fact to a court, client or another person shall result in actual suspension or disbarment depending upon the extent to which the victim of the misconduct is harmed or

misled and depending upon the magnitude of the act of misconduct and the degree to which it relates to the member's acts within the practice of law."

Applying these standards and the applicable case law to this situation, it is this court's recommendation that respondent be disbarred for his misconduct. His misdeeds were many and extended over an extensive period of time. They resulted in injury to his clients and others. Respondent allowed the misconduct of those under his control to continue even after he was fully aware that those individuals were acting improperly and harming members of the public. And now, rather than accepting responsibility for his actions, he seeks to blame others for it.

The purpose of discipline here is to protect the public. There is no reason to believe that respondent has learned the error of his ways or that he will not continue in them. In such situations, both the standards and prudent judgment dictate that disbarment should be ordered. (See, e.g., *In the Matter of Steele* (Review Dept. 1997) 3 Cal.State Bar Ct. Rptr. 708.)

V. DISCIPLINE

This court recommends that respondent **JAMES EARL BROWN** be disbarred from the practice of law in the State of California and that his name be stricken from the Roll of Attorneys of all persons admitted to practice in this state.

Rule 9.20

The court further recommends that respondent be ordered to comply with California Rules of Court, rule 9.20 and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court order in this matter.[11]

[11] Respondent is required to file a rule 9.20(c) affidavit even if he has no clients to notify. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.) In addition to being punished as a crime or a contempt, an attorney's failure to comply with rule 9.20 is also, inter alia, a ground for denying his or her petition for reinstatement after disbarment. (Cal. Rules of Court, rule 9.20(d).)

VI. COSTS

It is further recommended that costs be awarded to the State Bar in accordance with section 6086.10 and that such costs be enforceable both as provided in section 6140.7 and as a money judgment.

Order Of Inactive Enrollment

In accordance with Business and Professions Code section 6007, subdivision (c)(4), it is ordered that **JAMES EARL BROWN** be involuntarily enrolled as an inactive member of the State Bar of California effective three court days after service of this decision and order by mail (Rules Proc. of State Bar, rule 220(c)).[12]

Dated: February _____, 2009

DONALD F. MILES
Judge of the State Bar Court

[12] Only active members of the State Bar may lawfully practice law in California. (Bus. & Prof. Code, § 6125.) It is a crime for an attorney who has been enrolled inactive (or disbarred) to practice law, to attempt to practice of law, or to even hold himself or herself out as entitled to practice law. (Bus. & Prof. Code, § 6126, subd. (b).) Moreover, an attorney who has been enrolled inactive (or disbarred) may not lawfully represent others before any state agency or in any administrative hearing even if laypersons are otherwise authorized to do so. (*Ibid.*; *Benninghoff v. Superior Court* (2006) 136 Cal.App.4th 61, 66-73.)